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Board As Liquidating Agent For Western Corporate Federal Credit Union

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NATIONAL CREDIT UNION
ADMINISTRATION BOARD AS
LIQUIDATING AGENT FOR
WESTERN CORPORATE FEDERAL
CREDIT UNION,

Plaintiff,

v.

ROBERT A. SIRAVO, TODD M. LANE,
ROBERT J. BURRELL, THOMAS E.
SWEDBERG, TIMOTHY T. SIDLEY,
ROBERT H. HARVEY, JR., WILLIAM
CHENEY, GORDON DAMES, JAMES
P. JORDAN, TIMOTHY KRAMER,
ROBIN J. LENTZ, JOHN M. MERLO,
WARREN NAKAMURA, BRIAN
OSBERG, DAVID RHAMY and
SHARON UPDIKE,

Defendants.

Case No.: CV10-01597 GW (MANx)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF MOTION OF PLAINTIFF AND
COUNTERDEFENDANT
NATIONAL CREDIT UNION
ADMINISTRATION BOARD AS
LIQUIDATING AGENT FOR
WESTERN CORPORATE
FEDERAL CREDIT UNION TO
DISMISS AMENDED
COUNTERCLAIMS FOR: (1)
LACK OF SUBJECT MATTER
JURISDICTION; AND (2)
FAILURE TO STATE A CLAIM
UPON WHICH RELIEF MAY BE
GRANTED [Fed. R. Civ. P. 12(b)(1)
and 12(b)(6)]**

Date: January 9, 2012
Time: 8:30 a.m.
Courtroom: 10

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Defendants and counterclaimants Robert A. Siravo (“Siravo”), Thomas E.
4 Swedberg (“Swedberg”), Timothy T. Sidley (“Sidley”), Robert J. Burrell
5 (“Burrell”), and Todd M. Lane (“Lane”) (collectively, the “Officer Defendants”),
6 have each filed Amended Counterclaims against plaintiff and counterdefendant the
7 National Credit Union Administration Board as Liquidating Agent for Western
8 Corporate Federal Credit Union (the “NCUA”). Each Officer Defendant alleges
9 that, as a former officer of Western Corporate Federal Credit Union (“WesCorp”),
10 he is entitled to, *inter alia*, indemnification, payment of defense costs (including
11 advances of funds to pay defense costs), and costs incurred to secure indemnity.
12 Siravo and Swedberg pray for an order that the NCUA advance their defense costs,
13 and Sidley alleges that he is entitled to a judicial declaration that the NCUA is
14 obligated to indemnify him and to advance future defense costs.

15 The NCUA here moves first for dismissal of those counterclaims that seek to
16 require the NCUA to make payments unless and until the Officer Defendants prevail
17 (*i.e.*, the Officer Defendants’ claims for advancement, “reimbursement,” and
18 declaratory relief). Second, it moves on independent grounds for dismissal of the
19 indemnification claims asserted in the Amended Counterclaims in their entirety.

20 The Officer Defendants’ claims seeking payments from the NCUA prior to
21 resolution of this matter fail under both Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P.
22 12(b)(6). First, the Court lacks subject matter jurisdiction to adjudicate the claims
23 because they seek either an order requiring payment (advancement or
24 reimbursement) or declaratory relief that the Officer Defendants have a right to
25 payment. Under 12 U.S.C. § 1787(g), the courts lack jurisdiction to grant relief that
26 would “restrain or affect” the NCUA’s exercise of its statutory powers. Orders
27 requiring payments or related declarations of rights fall within the scope of the
28 statute.

1 Second, as a matter of law, the Officer Defendants have no legal right to
2 payment before final resolution of this action. Under 12 C.F.R. § 701.33(c)(6), the
3 regulation governing the availability of indemnification to officers of credit unions,
4 a credit union's decision whether to advance or reimburse legal expenses during the
5 pendency of a lawsuit (1) is wholly discretionary, but (2) requires the credit union to
6 make specific supporting findings. Here, the NCUA has not elected to advance or
7 reimburse the Officer Defendants' litigation expenses, and it has not made the
8 findings required under Section 701.33(c)(6) to do so. Accordingly, the Officer
9 Defendants cannot pursue a claim for advancement or reimbursement.

10 Moreover, the Officer Defendants do not allege any substantive basis for
11 advancement or reimbursement. Neither California law nor the Model Business
12 Corporation Act (the "MBCA") requires advances or reimbursement during the
13 pendency of a lawsuit, nor does the WesCorp policy ("Policy 21") relied upon by
14 the Officer Defendants. Without a substantive basis for the relief they seek, the
15 Officer Defendants cannot state a claim.

16 Besides dismissing the claims seeking payment during the pendency of the
17 action, the Court should also dismiss the Officer Defendants' claims for
18 indemnification in their entirety. First, the counterclaims for indemnification (and
19 advancement and reimbursement) fail because the regulations authorizing
20 indemnification by financial institutions such as WesCorp apply only to solvent
21 institutions. As a matter of law, corporate officers sued by the receiver or liquidator
22 of a failed financial institution may not obtain indemnification from the estate of the
23 failed institution, even if the officers ultimately defeat the claims against them.

24 Second, the Officer Defendants' claims for indemnification under Cal. Labor
25 Code § 2802 (including advancement and reimbursement) fail because that statute is
26 inapplicable to the claims asserted by the Officer Defendants here. Section 2802
27 does not apply to an employee's claim against an employer seeking indemnity for
28 expenses incurred by the employee in defending against a lawsuit brought by the

1 employer. Furthermore, claims for indemnification by directors and officers of a
2 non-profit corporation are governed by Cal. Corp. Code § 7237 – a statute directly
3 addressing such claims – and not by the more general Labor Code section.¹

4 Third, the claims for indemnification are not ripe because, under both
5 California law and the MBCA, a corporate officer must prevail in order to have a
6 right to mandatory indemnification. Because the Officer Defendants have not yet
7 prevailed, their counterclaims are not yet ripe. While declaratory relief usually
8 creates ripeness in indemnification situations, the Court does not have jurisdiction to
9 issue declaratory relief here.

10 The counterclaims for advancements, reimbursement, declaratory relief, and
11 indemnification in the Amended Counterclaims should be dismissed.

12 **BACKGROUND**

13 **A. The Complaint**

14 The NCUA filed its Second Amended Complaint (the “SAC”) [Docket 116]
15 on February 22, 2011. The SAC’s First Claim for Relief for Breach of Fiduciary
16 Duty alleges a claim against Siravo, Lane, Burrell, and Sidley for breaches of their
17 duty of care while acting as officers of WesCorp, which resulted in more than \$6.8
18 billion in losses in WesCorp’s investment portfolio and its ultimate demise. The
19 SAC’s Fifth Claim for Relief for Breach of Fiduciary Duty and Sixth Claim for
20 Relief for Fraud seek relief as against Siravo and Swedberg for their wrongful
21 actions concerning the amendments to the Siravo SERP and the Executive SERP.²

22 **B. WesCorp’s Policy 21.**

23 WesCorp’s Board of Directors adopted a resolution regarding indemnification
24 and insurance, codified in WesCorp’s book of policies as “Policy 21.” *See*
25 Siravo/Swedberg Counterclaim [Docket 190], ¶ 286; Sidley Counterclaim [Docket

26 ¹ Under Section 7237, mandatory indemnification requires prevailing on the
27 merits.

28 ² The parties have agreed to stipulate to the dismissal of the NCUA’s Seventh
and Eighth Claims for Relief for Breach of Fiduciary Duty and Unjust Enrichment.

191], ¶ 290; Burrell Counterclaim [Docket 192], ¶ 336; Lane Counterclaim [Docket 193], ¶ 257. In Policy 21, WesCorp agreed to indemnify WesCorp’s current and former “officials” and “employees” “to the maximum extent permitted by either” California law or the MBCA “for any liability asserted against them in connection with judicial or administrative proceedings, formal or informal, to which they are or may become parties by reason of the performance of their official duties.” Siravo/Swedberg Counterclaim [Docket 190], ¶ 287; Sidley Counterclaim [Docket 191], ¶ 291; Burrell Counterclaim [Docket 192], ¶ 337; Lane Counterclaim [Docket 193], ¶ 258. Policy 21 also provided that the indemnification was to include the recovery of reasonable attorneys’ fees and costs incurred to secure indemnification. *See* Siravo/Swedberg Counterclaim [Docket 190], ¶ 288; Sidley Counterclaim [Docket 191], ¶ 292; Burrell Counterclaim [Docket 192], ¶ 338; Lane Counterclaim [Docket 193], ¶ 259.

C. The NCUA’s Denial of the Officer Defendants’ Requests for Indemnity and Advancement of Defense Costs

Each Officer Defendant filed an administrative claim with the NCUA seeking: (1) reimbursement of past defense costs incurred in this litigation; (2) advancement of future defense costs; and (3) indemnification for costs incurred in establishing the right to indemnity. *See* Siravo/Swedberg Counterclaim [Docket 190], ¶ 290; Sidley Counterclaim [Docket 191], ¶ 308; Burrell Counterclaim [Docket 192], ¶¶ 347, 349; Lane Counterclaim [Docket 193], ¶ 261. The NCUA has declined to reimburse, advance costs to, or indemnify the Officer Defendants. *See* Siravo/Swedberg Counterclaim [Docket 190], ¶ 290; Sidley Counterclaim [Docket 191], ¶ 309; Burrell Counterclaim [Docket 192], ¶¶ 348, 350; Lane Counterclaim [Docket 193], ¶ 262.

D. The Counterclaims

In Amended Answers and Counterclaims filed on October 31, 2011, the Officer Defendants each asserted counterclaims against the NCUA. Siravo and

1 Swedberg (in a combined pleading), Burrell, and Lane each allege largely the same
2 four counterclaims against the NCUA. Sidley alleges three counterclaims against
3 the NCUA, two of which largely duplicate counterclaims asserted by the other
4 Officer Defendants. Sidley's third counterclaim seeks declaratory relief.

5 As discussed in more detail below, each of the Officer Defendants alleges that
6 the NCUA has breached indemnification obligations under Policy 21 and that, under
7 that policy, the NCUA is obligated to indemnify them and to provide them advances
8 to the fullest extent permitted by either California law or the MBCA. Each of the
9 Officer Defendants also seeks indemnification under Labor Code Section 2802.³

10 In their First Counterclaim for Breach of Obligation to Pay Litigation Costs
11 under Policy 21, Siravo, Swedberg, Burrell, and Lane claim that the NCUA is
12 obligated under Policy 21 to pay their defense costs incurred in this litigation. *See*
13 Siravo/Swedberg Counterclaim [Docket 190], ¶¶ 294-300; Burrell Counterclaim
14 [Docket 192], ¶¶ 351, 363-71;⁴ Lane Counterclaim [Docket 193], ¶¶ 265-72. They
15 allege that the NCUA's "obligation" includes the obligation to advance funds to pay
16 their defense costs before the final disposition of this case.⁵ *See* Siravo/Swedberg
17 Counterclaim [Docket 190], ¶ 296; Burrell Counterclaim [Docket 192], ¶ 364; Lane
18 Counterclaim [Docket 193], ¶ 267. They further allege that they have incurred, and
19 will continue to incur, damages in the form of defense costs incurred in this lawsuit
20 as a result of the NCUA's failure to pay such costs. *See* Siravo/Swedberg
21
22

23 ³ The Officer Defendants do *not* allege a right to indemnification based upon
24 Cal. Corp. Code § 7237, the statute which expressly governs the right to
indemnification and advances of officers of nonprofit corporations.

25 ⁴ Burrell's Amended Answer and Counterclaims [Docket 192] omits paragraphs
352-62.

26 ⁵ The Officer Defendants other than Sidley state their willingness to provide the
27 NCUA a written affirmation and undertaking as required for advancement of costs
28 under MBCA § 8.53. *See* Siravo/Swedberg Counterclaim [Docket 190], ¶ 297;
Burrell Counterclaim [Docket 192], ¶¶ 366-68; Lane Counterclaim [Docket 193],
¶ 269.

1 Counterclaim [Docket 190], ¶¶ 299-300; Burrell Counterclaim [Docket 192],
2 ¶¶ 370-72; Lane Counterclaim [Docket 193], ¶¶ 271-72.

3 In their Second Counterclaim for Damages for Breach of Obligation to Pay
4 Litigation Costs Under California Labor Code Section 2802, Siravo, Swedberg,
5 Burrell, Lane, and Sidley allege that because they were WesCorp employees at all
6 relevant times, the NCUA as liquidator for WesCorp is obligated under Cal. Labor
7 Code § 2802 to pay their past defense costs, and to advance their defense costs “as
8 they are incurred in this litigation.” Siravo/Swedberg Counterclaim [Docket 190],
9 ¶¶ 301-07; Sidley Counterclaim [Docket 191], ¶¶ 321-27; Burrell Counterclaim
10 [Docket 192], ¶¶ 373-80; Lane Counterclaim [Docket 193], ¶¶ 273-79. They further
11 allege that they have incurred, and will continue to incur, damages in the form of
12 defense costs incurred in this lawsuit as a result of the NCUA’s failure to pay such
13 costs. *See* Siravo/Swedberg Counterclaim [Docket 190], ¶¶ 306-07; Sidley
14 Counterclaim [Docket 191], ¶ 327; Burrell Counterclaim [Docket 192], ¶¶ 379-80;
15 Lane Counterclaim [Docket 193], ¶¶ 278-79.

16 In the Third Counterclaim of Siravo, Swedberg, Burrell, and Lane for
17 Damages for Breach of Obligation to Provide Indemnity Under Policy 21 and the
18 First Counterclaim of Sidley for Indemnification Under Policy 21, the Officer
19 Defendants claim that they are entitled to indemnification, as well as defense costs,
20 and costs incurred to secure indemnity under Policy 21. *See* Siravo/Swedberg
21 Counterclaim [Docket 190], ¶¶ 310-11; Sidley Counterclaim [Docket 191], ¶¶ 316-
22 20; Burrell Counterclaim [Docket 192], ¶¶ 382-84; Lane Counterclaim [Docket
23 193], ¶¶ 282-83. They further allege that they will suffer damages in an amount to
24 be determined if the NCUA “refuses to indemnify” them. Siravo/Swedberg
25 Counterclaim [Docket 190], ¶ 311; Sidley Counterclaim [Docket 191], ¶ 320;
26 Burrell Counterclaim [Docket 192], ¶ 385; Lane Counterclaim [Docket 193], ¶ 284.⁶

27
28 ⁶ In their Fourth Counterclaim, which is not the subject of this motion, Siravo, Swedberg, Burrell, and Lane each allege that the NCUA is liable for WesCorp’s

1 In his Third Counterclaim for Declaratory Relief, Sidley alleges that he is
2 entitled to a judicial declaration regarding the NCUA's alleged obligation to
3 advance and indemnify his defense costs under Policy 21, the MBCA and Section
4 2802. *See* Sidley Counterclaim [Docket 191], ¶¶ 328-38.

5 The Officer Defendants each pray for an award of damages on their
6 counterclaims. *See* Siravo/Swedberg Counterclaim [Docket 190], prayer, ¶ 4;
7 Sidley Counterclaim [Docket 191], prayer ¶ 3; Burrell Counterclaim [Docket 192],
8 prayer ¶ 3; Lane Counterclaim [Docket 193], prayer, ¶ 3. In addition, Siravo and
9 Swedberg expressly ask the Court to "adjudge and declare that NCUA is obligated
10 to pay to advance to Siravo and Swedberg their defense costs incurred in this action
11 and to the fullest extent any liability incurred by Siravo and Swedberg" and to order
12 such payment. Siravo/Swedberg Counterclaim [Docket 190], prayer, ¶¶ 3, 5.

13 Burrell ask the Court to order the NCUA to "reimburse [him] for the defense costs
14 he has incurred in this litigation."⁷ Burrell Counterclaim [Docket 192], prayer, ¶ 4.

15 The other Officer Defendants do not explicitly seek advances in their prayers, but
16 instead seek "such other and further relief as the Court may deem just and proper,"
17 Sidley Counterclaim [Docket 191], prayer ¶ 7; Burrell Counterclaim [Docket 192],
18 prayer ¶ 6; Lane Counterclaim [Docket 193], prayer, ¶7. Sidley expressly seeks

19
20 purported obligation to provide insurance coverage against "any liability" asserted
21 against him. *See* Siravo/Swedberg Counterclaim [Docket 190], ¶¶ 315-16; Burrell
22 Counterclaim [Docket 192], ¶¶ 391-92; Lane Counterclaim [Docket 193], ¶¶ 290-
23 91. They further allege that the NCUA is liable for their defense costs and the
24 claims against them in this litigation because the NCUA canceled the CUMIS
25 policy, refusing to obtain replacement insurance or supplemental insurance. *See*
26 Siravo/Swedberg Counterclaim [Docket 190], ¶ 317; Burrell Counterclaim [Docket
27 192], ¶¶ 393, 395; Lane Counterclaim [Docket 193], ¶¶ 292, 294.

28 In his Third Counterclaim, Sidley seeks declaratory relief based on Policy 21's
provision that WesCorp "purchase and maintain" insurance "against any liability
asserted against" him. Sidley Counterclaim [Docket 191], ¶¶ 330-34. This motion
is not directed towards those allegations, either.

⁷ Counsel for Burrell has offered to stipulate to strike Burrell's prayer asking that
"the NCUA be ordered to reimburse Burrell for the defense costs he has incurred in
this litigation," Burrell Counterclaim [Docket 192], prayer, ¶ 4, and the prayers of
Lane and Sidley do not seek a reimbursement order from the NCUA.

declaratory relief as to his right to advances, *see* Sidley Counterclaim [Docket 191], ¶¶ 329, 335, 337.

LEGAL ARGUMENT

I. THE COURT SHOULD DISMISS THE COUNTERCLAIMS TO THE EXTENT THAT THEY SEEK TO REQUIRE THE NCUA TO MAKE PAYMENTS DURING THE PENDENCY OF THIS LAWSUIT.

A. The Court Lacks Subject Matter Jurisdiction to Order Legal Expense Payments or to Issue Declaratory Relief.

Besides seeking damages, Siravo and Swedberg explicitly seek an advancement and reimbursement order from the Court, and Sidley seeks declaratory relief including a declaration that he is entitled to advancement and reimbursement of costs while the action is pending.⁸ The Court cannot grant this relief. Under U.S.C. § 1787(g), the courts do not have subject matter jurisdiction to take any action to “restrain or affect” the NCUA’s exercise of its statutory powers. *See id.* Section 1787(g) provides:

... Except as provided in this section, ***no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Board as a conservator or a liquidating agent.***

Id. (emphasis added).

Like its FDIC counterpart, 12 U.S.C. § 1821(j), Section 1787(g) “effect[s] a sweeping ouster of courts’ power to grant equitable remedies to parties like the [plaintiffs],” barring not only injunctive relief but also declaratory relief that would restrain a government agency that has taken over a financial institution from fulfilling its statutory duties in dealing with the assets of that institution. *Freeman v. FDIC*, 56 F.3d 1394, 1398-99 (D.C. Cir. 1995) (applying Section 1821(j), which uses essentially the same language in prohibiting courts from restraining or affecting

⁸ While Burrell and Lane do not explicitly seek payment during the pendency of the action, they have alleged that the NCUA has breached its obligation to advance defense costs. This allegation is only material if they are in fact seeking that relief.

the exercise of powers or functions of the FDIC as a conservator or a receiver). *See Sahni v. American Diversified Partners*, 83 F.3d 1054, 1058-59 (9th Cir. 1996) (“[e]ssential to the[] [FDIC’s] enumerated powers [as a receiver] is the FDIC’s ability to carry out its basic functions as a receiver free from judicial restraint, pursuant to 12 U.S.C. § 1821(j)”). In particular, Section 1787(g) deprives the courts of jurisdiction to require the NCUA, which is acting as liquidating agent, to pay a claimed creditor, given that the NCUA is under a statutory directive to itself determine where payments should go. *See Courtney v. Halleran*, 485 F.3d 942, 946-50 (7th Cir. 2007) (Section 1821(j) barred declaratory, injunctive, and other equitable relief to require the FDIC to make payments where it had specific statutory authority “to direct where funds should go”).

Section 1787(g) requires dismissal pursuant to Fed. R. Civ. P. 12(b)(1) of any counterclaim seeking either an Order requiring advancement of costs or declaratory relief. Both forms of relief would restrain or affect the powers and functions of the NCUA. The NCUA’s basic function as liquidating agent is to marshal the assets of the liquidation estate, to determine the validity and priority of the claims against the estate, and to pay pro rata shares of the marshaled assets in accordance with the statutory priority scheme. An advancement or reimbursement order would directly interfere with this process by requiring the NCUA to make payments of money outside the statutory scheme.

Although not an injunction, a judicial declaration would similarly restrain or affect the powers and functions of the NCUA as liquidating agent. *See, e.g., Freeman*, 56 F.3d at 1399 (“[n]ot only does [Section 1821(j)] bar injunctive relief, but in the circumstances of the present case where appellants seek a declaratory judgment that would effectively ‘restrain’ the FDIC from foreclosing on their property, § 1821(j) deprives the court of power to grant that remedy as well”); *Carney v. RTC*, 19 F.3d 950, 958 (5th Cir. 1994) (Section 1821(j) barred claim for declaratory relief that plaintiffs were not liable to the RTC because such claim was

1 an “attempt[] to enjoin the RTC from including them in the state court action under
2 the guise of bringing a declaratory judgment action”; plaintiffs’ “claim for
3 declaratory relief was an attempt to ‘restrain or affect’ the RTC’s ability to exercise
4 its authorized powers or functions just as completely as an injunction would”).

5 While Section 1787(g) deprives the Court of jurisdiction to grant injunctive
6 and declaratory relief, it does not leave the Officer Defendants without a remedy.
7 Under 12 U.S.C. § 1787(b), they are entitled to *de novo* judicial review of the denial
8 of their administrative claims for damages arising from the alleged failure to
9 indemnify – a right they are asserting in the Counterclaims. If the Court finds that
10 their claims were wrongly disallowed, it can allow them and fix the correct claim
11 amount. The claims would then be paid in accordance with the statutory liquidation
12 priority scheme. Accordingly, the Court lacks subject matter jurisdiction either to
13 order payments of legal expenses or to issue declaratory relief to the same effect.

14 **B. The Officer Defendants Cannot State a Claim Against the NCUA**
15 **for Payment During the Pendency of this Lawsuit.**

16 **1. Under the Governing Regulations, Federal Credit Unions**
17 **Have Discretion Whether to Advance Costs While a Matter**
18 **is Pending.**

19 Any right of the Officer Defendants to advancement or reimbursement during
20 the pendency of this lawsuit is subject to 12 C.F.R. § 701.33(c)(6), which governs a
21 credit union’s determination whether to pay an officer’s or employee’s attorneys’
22 fees in advance of final judgment.⁹ That regulation provides that:

23 ⁹ While Section 701.33(c)(6) did not become effective until January 27, 2011,
24 the regulation is applicable to decisions as to indemnification made after that date
25 even though indemnification is sought based upon conduct occurring before that
26 date. As the NCUA Board recently explained in adopting a related indemnification
27 regulation:

28 *... [T]o the extent that an FICU’s indemnification provisions are
reflected in a general policy statement or a bylaw provision with
general applicability, the Board takes the view that, following the
effective date of the final rule, the policy or bylaw must be interpreted
so as to give effect to the rule’s prohibitions.*

1 ***A Federal credit union may, before final disposition of a proceeding***
2 ***referred to in paragraph (c)(5) of this section, advance funds to pay for or***
3 ***reimburse the expenses***, including legal fees, reasonably incurred in
4 connection with the proceeding by an official or employee who is a party
5 to the proceeding because that individual is or was an official or employee
6 of the credit union if:

7 (i) The disinterested members of the credit union's board
8 of directors (or in the event there are fewer than two disinterested
9 directors, the supervisory committee) in good faith, determine in
10 writing after due investigation and consideration that the official
11 or employee acted in good faith and in a manner he or she
12 reasonably believed to be in the best interests of the credit union's
13 members;

14 (ii) The disinterested members of the credit union's board
15 of directors (or the supervisory committee, as the case may be), in
16 good faith, determine in writing that the payment or
17 reimbursement of the expenses will not materially affect the credit
18 union's safety and soundness; and

19 (iii) The official or employee provides:

20 (A) A written affirmation of the individual's
21 reasonable good faith belief that the relevant standard of
22 conduct described in § 701.4(b) of this chapter has been
23 met by the individual; and

24 (B) A written undertaking to repay the credit
25 union for any funds advanced or reimbursed, to the extent
26 not covered by payments from insurance, if the official or
27 employee is not entitled to indemnification under
28 paragraph (c)(5) of this section.

Id. (emphasis added).

Thus, under Section 701.33(c)(6), a credit union's decision whether to
advance or reimburse expenses prior to judgment is wholly discretionary. In order
to advance costs, the credit union's decision makers must determine in writing that:
(1) "the official or employee acted in good faith and in a manner he or she
reasonably believed to be in the best interests of the credit union's members"; and
(2) "the payment or reimbursement of the expenses will not materially affect the
credit union's safety and soundness." 12 C.F.R. § 701.33(c)(6)(ii)-(iii). Even where

76 Fed. Reg. 30510-01, 30512 (May 26, 2011) (emphasis added). Accordingly,
WesCorp's Policy 21 must be interpreted so as to give effect to the prohibitions in
Section 701.33(c)(6).

1 the decision makers make these two determinations, Section 701.33(c)(6) still gives
2 the credit union discretion whether to advance or reimburse expenses.

3 Here, the Officer Defendants' counterclaims for advancement of costs are
4 devoid of any allegation that the NCUA made either of the findings required under
5 Section 701.33(c)(6). Furthermore, even if the NCUA had made such findings,
6 under Section 701.33(c)(6) it is still within the NCUA's discretion not to advance or
7 reimburse expenses. Accordingly, the Officer Defendants have no right to
8 indemnification or reimbursement of defense costs unless and until the Court enters
9 judgment in their favor on the NCUA's claims against them. *Cf. Gentile v.*
10 *SinglePoint Fin., Inc.*, 788 A.2d 111, 113 (Del. 2001) (where a statute provides that
11 a corporation "may" make advances and has not provided for mandatory
12 advancements, a director may not compel advancements); *Thompson v. The*
13 *Williams Cos., Inc.*, 2007 Del. Ch. LEXIS 112 at *7 (Del. Ch. July 31, 2007)
14 ("advancement is not mandatory absent a clearly worded by-law or contract making
15 it mandatory"); *Havens v. Attar*, 1997 WL 55957 at *13, 1997 Del. Ch. LEXIS 12 at
16 *43 (Del. Ch. Jan. 30, 1997) ("a board's decision to accept an undertaking and to
17 advance expenses is left to *the business judgment of the board in the absence of a*
18 *by-law specifically providing for mandatory advancement*") (emphasis in original).

19 2. **Neither Policy 21 Nor the Provisions Referred to Therein**
20 **Create a Right to Payment While a Matter is Pending.**

21 The Officer Defendants assert that Policy 21 establishes a right to
22 advancement and reimbursement. However, Policy 21 does not explicitly provide
23 for advances or reimbursement of defense costs during the pendency of an action
24 (let alone for advances for costs incurred by the Officer Defendants in defending
25 against litigation brought in the right of the corporation itself). Nor do the MBCA
26 and Labor Code Section 2802 – the provisions the Officer Defendants claim are
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1 incorporated by reference into Policy 21.¹⁰ Corporations Code Section 7237, the
2 California statute that actually governs the Officer Defendants' claim for
3 indemnification, likewise does not create a right to advancement or reimbursement.

4 While both Section 7237 and the MBCA give a corporation the power to
5 make advances or reimburse costs during the pendency of a lawsuit, neither
6 provision requires it to do so. *See* Cal. Corp. Code § 7237(c) (“[a] corporation **shall**
7 **have power** to indemnify any person who was or is a party . . . to any . . . pending
8 . . . action . . .”) (emphasis added); MBCA § 8.53(a) (“[a] corporation **may**, before
9 final disposition of a proceeding, advance funds to pay for or reimburse the
10 expenses incurred in connection with the proceeding . . .”) (emphasis added).¹¹ Both
11 Section 7237 and the MBCA make indemnification mandatory only after an officer
12 has been successful on the merits. *See* Cal. Corp. Code § 7237(d) (“[t]o the extent
13 that an agent of a corporation has been successful on the merits . . . , the agent shall
14 be indemnified against expenses actually and reasonably incurred by the agent . . .”);
15 MBCA § 8.52 (“[a] corporation shall indemnify a director who was wholly
16 successful, on the merits or otherwise . . .”).

17 Similarly, under Section 2802¹² an employee is not entitled to indemnity
18 unless the claims of wrongdoing or negligence asserted against the employee have
19 been proven to be unfounded or without merit. *See O’Hara v. Teamsters Union*
20 *Local No. 856*, 151 F.3d 1152, 1159-60 (9th Cir. 1998) (an employer is exempt from

22 ¹⁰ Policy 21 does not comply with applicable regulations because it purports to
23 allow indemnification to the maximum extent permitted by either California law or
24 the MBCA. Federal credit unions are required elect to follow either state law or the
25 MBCA (but not both). *See* 12 C.F.R. § 701.33(c)(2) (“[a] federal credit union that
26 elects to provide indemnification shall specify whether it will follow the relevant
27 state law or the Model Business Corporation Act.”).

28 ¹¹ While the MBCA authorizes a corporation to adopt a provision obligating itself
to “advance funds to pay for or reimburse expenses in accordance with section
8.53,” MBCA § 8.58, the Officer Defendants do not and cannot allege that WesCorp
ever adopted such a provision.

¹² For the reasons discussed in Part II.B below, the Officer Defendants have not
stated a claim under Section 2802.

1 a responsibility to indemnify the employee under Section 2802 unless the claims
2 against the employee are proven to be “unfounded” or “without merit”).

3 Here, the Officer Defendants have not alleged that the claims against them
4 have been proven to be unfounded or without merit; they cannot so allege, given
5 that this lawsuit is still ongoing. Thus, the Officer Defendants have failed to state a
6 claim for advancement of costs under Section 2802.

7 **II. THE COURT SHOULD DISMISS THE COUNTERCLAIMS TO THE**
8 **EXTENT THAT THEY SEEK INDEMNIFICATION.**

9 **A. The Officer Defendants Cannot Obtain Indemnification for**
10 **Actions Brought by the NCUA Based upon Their Allegedly**
11 **Wrongful Conduct.**

12 The counterclaims must be dismissed to the extent that they seek
13 indemnification from the NCUA because, as a matter of law, corporate officers or
14 directors sued by a receiver or liquidator for a failed financial institution may not
15 obtain indemnification from that plaintiff, regardless of whether they might have
16 had a right to obtain indemnification had the institution remained solvent.

17 Once a financial institution fails, indemnification for suits brought by the
18 receiver or liquidator against the institution’s directors and officers is unavailable,
19 even if the directors and officers ultimately defeat the claims against them. *See,*
20 *e.g., Adams v. RTC*, 831 F. Supp. 1471, 1478-79 (D. Minn.) (“when the RTC sues
21 the directors for their wrongful conduct against the institution, indemnification is
22 simply unavailable”), *aff’d*, 10 F.3d 568 (8th Cir. 1993). Put otherwise, the
23 indemnification regulations governing financial institutions apply only to solvent
24 institutions. *See, e.g., RTC v. Eason*, 17 F.3d 1126, 1134-35 (8th Cir. 1994); *RTC v.*
25 *Gregor*, 1995 WL 931093 at *4, 1995 U.S. Dist. LEXIS 22032 at *14-15 (E.D.N.Y.
26 Sept. 29, 1995); *RTC v. Baker*, 1994 WL 637359 at *7, 1994 U.S. Dist. LEXIS
27 16218 at *21-23 (E.D. Pa. Nov. 14, 1994).

28 For instance, in *Adams* the RTC took over a failed savings and loan and sued
its former officers and directors for breach of fiduciary duty. Several of the

1 directors counterclaimed for indemnification for damages, costs, and attorneys' fees
2 under 12 C.F.R. § 545.121, the Office of Thrift Supervision's indemnification
3 regulation for officers and directors of a Federal savings association. The court
4 granted the RTC summary judgment on the indemnification counterclaims, holding
5 that "when the RTC sues the directors for their wrongful conduct against the
6 institution, indemnification is simply unavailable." *Adams*, 831 F. Supp. at 1479.
7 As the court explained, allowing indemnification for actions brought by the RTC
8 under Section 545.121 "would lead to the absurd result that the RTC could succeed
9 in a suit against the perfidious directors, and then recover from itself." *Id.* at 1478
10 (noting that "[t]he regulation was apparently created for the legitimate purpose of
11 protecting the faithful director who is sued by a third party").

12 Similarly, in *Eason* the RTC as receiver of a failed bank sued former directors
13 and officers of the bank for negligence and breach of fiduciary duty in approving
14 loans that later failed. The district court dismissed the RTC's claims but denied
15 defendants' motion for attorneys' fees under Section 545.121. The Eighth Circuit
16 affirmed, based upon its conclusion that Section 545.121 applies only to solvent
17 institutions. *See Eason*, 17 F.3d at 1135. In support, the Eighth Circuit relied upon
18 the language of: (1) Section 545.121(c)(2)(iii), which requires indemnification in
19 cases where the director prevails on the merits only upon the approval of the
20 majority of the directors and officers of the savings association; and (2) Section
21 545.121(e), which provides for the advancement of funds subject to the majority
22 approval of the board. *See id.* Because both provisions "assume the existence of an
23 ongoing institution with a working board of directors," the Eighth Circuit concluded
24 that "as to a claim for attorney's fees against RTC the regulation as a whole applies
25 only during the life of the indemnifying association or the life of its 'legal
26 representative, successors, and assigns.'" *Id.* (quoting 12 C.F.R. § 545.121(a)(2)).

27 In *Baker*, 1994 WL 637359 at *7, 1994 U.S. Dist. LEXIS 16218 at *21-23,
28 the RTC argued that indemnification under Section 545.121 "is not possible where

1 the RTC acts as a receiver as this would essentially lead to the undesired effect of
2 the RTC indemnifying the directors and officers every time it succeeded in a suit
3 against those individuals, thereby depleting the very fund it is attempting to
4 maximize.” *Id.* The court dismissed the indemnification claim because the savings
5 and loan “once it was placed under receivership, was no longer an ‘ongoing
6 [financial] institution with a working board of directors.’” *Id.*

7 In *Gregor*, 1995 WL 931093 at *4, 1995 U.S. Dist. LEXIS 22032 at *14-15,
8 and *RTC v. Atherton*, 1994 U.S. Dist. LEXIS 21427 at *12 (D.N.J. Sept. 9, 1994),
9 the courts struck affirmative defenses for indemnification asserted by bank directors
10 in response to claims brought against them by the RTC. The *Gregor* court followed
11 *Adams* and *Eason* in holding that indemnification was unavailable under the
12 indemnification regulations because those regulations assume the existence of an
13 ongoing institution with a working board of directors. See *Gregor*, 1995 WL
14 931093 at *4, 1995 U.S. Dist. LEXIS 22032 at *14-15. The *Atherton* court
15 followed *Adams* in holding that Section 545.121 precludes indemnification of a
16 financial institution’s directors when the RTC has sued those directors for their
17 wrongful conduct against the institution. See *Atherton*, 1994 U.S. Dist. LEXIS
18 21427 at *12.¹³

19 The principle that the receiver or liquidator of a failed financial institution has
20 no indemnification obligations in cases it brings against former officers and
21 directors applies to this case. First, the NCUA has brought this action in its capacity
22 as the liquidating agent for a failed credit union, WesCorp. Second, the NCUA is
23 suing the Officer Defendants for their wrongful conduct that directly led to the
24 collapse of WesCorp. Allowing indemnification for the NCUA’s lawsuit would
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26 ¹³ One district court in Mississippi declined to follow *Adams* and *Eason*; the
27 Eleventh Circuit vacated that holding based on the defendant’s failure to exhaust
28 administrative remedies, and it therefore did not reach the merits. See *RTC v. Scott*,
929 F. Supp. 1001, 1025-26 (S.D. Miss. 1996), *vacated*, 125 F.3d 254 (5th Cir.
1997).

1 lead to the “absurd result” that the NCUA could succeed in its suit against the
2 Officer Defendants, and then recover from itself. Finally, like the indemnification
3 regulation addressed by the courts in *Eason* and *Baker*, the indemnification
4 regulation governing federal credit unions contains language which “assume[s] the
5 existence of an ongoing institution with a working board of directors.” See 12
6 C.F.R. § 701.33(c)(6)(i)-(ii) (referring to determinations to be made by
7 “disinterested members of the credit union’s board of directors”). Thus, under
8 *Adams*, *Eason*, and *Baker*, the Officer Defendants are not entitled to indemnification
9 from the NCUA for this action brought by the NCUA and alleging that their
10 wrongful conduct caused WesCorp substantial damages.

11 **B. The Officer Defendants Cannot State a Claim Under Labor Code**
12 **Section 2802.**

13 The claims by the Officer Defendants based on Labor Code Section 2802
14 must be dismissed for two reasons. First, Section 2802 does not authorize an
15 employee to seek indemnity from an employer. See *Nicholas Labs., LLC v. Chen*,
16 2011 Cal. App. LEXIS 1287 at *10-23 (Oct. 12, 2011). As that court explained:

17 . . . We are not persuaded that the Legislature, in drafting section 2802,
18 intended to depart from the usual meaning of the word “indemnify” to
19 address “first party” disputes between employers and employees. The
20 Legislature could have specifically provided in section 2802 that
21 attorney fees incurred defending an action by the employer were
recoverable by a prevailing employee. The fact that the Legislature did
not do so suggests disputes between employers and employees are
subject to the ordinary rules applying to the recover of attorney fees in
California litigation.

22 *Id.* at *21.

23 Second, Section 2802 is inapplicable to the Officer Defendants’ claims for
24 indemnification because claims for indemnification brought by the officers or
25 directors of a non-profit corporation are governed by a specific statutory provision,
26 Cal. Corp. Code § 7237, and therefore not by the more general Labor Code section.
27 In *Los Angeles Protective League v. City of Los Angeles*, 27 Cal. App. 4th 168, 177-
28 79 (1994), the court recognized that “a particular or specific provision will prevail

1 over one which is more general” and that a later-in-time statute will prevail over an
2 earlier-in-time statute if the two cannot be reconciled; it therefore held that claims
3 for indemnity in cases involving public employees are governed by the specific
4 provisions of the California Tort Claims Act, not the more general provisions of
5 Section 2802. *See id.*

6 Here, Section 7237 of the Corporations Code, enacted in 1978, specifically
7 provides for indemnification of directors or officers of nonprofit corporations who
8 have been sued by reason of their position with the corporation:

9 (c) A corporation shall have power to indemnify any person
10 who was or is a party . . . to any threatened, pending or completed
11 action by or in the right of the corporation . . . by reason of the fact that
12 such person is or was an agent of the corporation, against expenses
13 actually and reasonably incurred by such person in connection with the
14 defense or settlement of such action if such person acted in good faith,
in a manner such person believed to be in the best interests of the
corporation and with such care, including reasonable inquiry, as an
ordinarily prudent person in a like position would use under similar
circumstances. No indemnification shall be made under this
subdivision:

15 (1) In respect of any claim, issue or matter as to
16 which such person shall have been adjudged to be liable to the
17 corporation in the performance of such person’s duty to the
18 corporation, unless and only to the extent that the court in
19 which such proceeding is or was pending shall determine upon
application that, in view of all the circumstances of the case,
such person is fairly and reasonably entitled to indemnity for
the expenses which such court shall determine[.]

20 . . .

21 (d) To the extent that an agent of a corporation has been
22 successful on the merits in defense of any proceeding referred to in
23 subdivision (b) or (c) or in defense of any claim, issue or matter therein,
the agent shall be indemnified against expenses actually and reasonably
incurred by the agent in connection therewith.

24 Cal. Corp. Code § 7237.

25 By contrast, Section 2802 of the Labor Code, enacted in 1937, provides
26 generally that:

27 (a) An employer shall indemnify his or her employee for all
28 necessary expenditures or losses incurred by the employee in direct
consequence of the discharge of his or her duties, or of his or her

1 obedience to the directions of the employer, even though unlawful,
2 unless the employee, at the time of obeying the directions, believed
them to be unlawful.

3 Cal. Labor Code § 2802.

4 Because the later-enacted Corporations Code Section 7237 expressly
5 addresses indemnification of the officers of nonprofit corporations, it prevails over
6 the prior-enacted Labor Code Section 2802, which generally sets forth the standards
7 for indemnifying employees. Accordingly, the Officer Defendants' counterclaims
8 based on Section 2802 do not state a claim for relief.

9 **C. The Officer Defendants' Claims for Indemnification are Not Ripe.**

10 As shown in Part I.C above, each of the provisions on which the Officer
11 Defendants rely or could rely for their indemnification claims – Corporations Code
12 Section 7237, the MBCA, and Labor Code Section 2802 – makes indemnification
13 mandatory only if the officers first prevail. Because the Officer Defendants have
14 not prevailed on the NCUA's claims against them, their counterclaims for
15 indemnification are not ripe.

16 In the ordinary case, a party seeking to establish its right to indemnification if
17 it prevails on the merits may establish ripeness by pleading a claim for *declaratory*
18 *relief* as to its right to indemnification.¹⁴ For the reasons discussed above, however,
19 the Officer Defendants are jurisdictionally barred by Section 1787(g) from bringing
20 claims for declaratory relief against the NCUA as to their right for indemnification.
21 Accordingly, the Officer Defendants must show that they now have ripe claims for
22 *indemnification*. They cannot do so.

23
24

¹⁴ Some authority holds that, at least outside the context of liability insurance,
25 even a claim for declaratory relief for indemnification is not ripe until the claimed
26 indemnitor has prevailed in the underlying action. *See, e.g., Lear Corp. v. Johnson*
27 *Elec. Holdings Ltd.*, 353 F.3d 580, 583 (7th Cir. 2003) (“[a] declaration that A must
28 indemnify B if X comes to pass has an advisory quality; and if the decision would
not strictly be an advisory opinion (anathema under Article III) it could be a
mistake, because it would consume judicial time in order to produce a decision that
may turn out to be irrelevant”).

1 The ripeness doctrine prohibits federal courts from becoming entangled in
2 disputes not ready for adjudication. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148
3 (1967). The courts are not to adjudicate “contingent future events that may not
4 occur as anticipated, or indeed may not occur at all.” *Thomas v. Union Carbide*
5 *Agric. Prods. Co.*, 473 U.S. 568, 579-81 (1985) (citation omitted). Here, the Officer
6 Defendants’ claims for indemnification are predicated upon a contingent future
7 event – resolution of this lawsuit in their favor – that may not occur as anticipated,
8 or at all. Thus, the Officer Defendants’ claims for indemnification are not now ripe,
9 and, for the reasons discussed above, those claims will not be ripe unless and until
10 the Officer Defendants have prevailed.

11 **CONCLUSION**

12 For the foregoing reasons, the NCUA respectfully requests that the Court
13 dismiss the Amended Counterclaims to the extent that they seek advancement,
14 reimbursement, declaratory relief, or indemnification.

15
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